answer the charge. The judgment of the House on the question of contempt cannot be examined or reviewed here. It does not distinctly appear from the facts found, when Williamson was released from the custody of the sergeant-at-arms, whether at Washington or in New York. Nor is it material, as the fact is found that he was not released until the 9th of February, four days after the action had been commenced. It appears that Williamson did in fact as soon as he was released return to the liberties of said jail. The question whether the release of Williamson at Washington, and his voluntary return without restraint or compulsion to New York, would have constituted an escape, is not presented by the facts found, and it is unnecessary to pass upon it. An escape after the action was commenced would not save it, if there was no cause of action at the time of its commencement. I am of the opinion, therefore, that the judgment is right, and should be affirmed.

Supreme Court of Pennsylvania.

PHYSICK'S ESTATE. APPEAL OF THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES, ETC.

1. Marriage is a civil contract and nothing more. It may may be presumed from cohabitation and reputation. It may be established by proof of the declarations and admissions of the parties.

2. Although the intercourse was originally meretricious, it is not necessary to show when it ceased to be meretricious and became matrimonial.

3. A counter-presumption may be established by proof of subsequent matrimonial cohabitation and reputation, and declarations of the husband.

4. Where conflicting presumptions exist, those in favor of matrimony and innocence must prevail.

Emlen Physick, the testator, died on the 24th of April 1859. By his will, which bears date the 11th of April 1857, he gives to Frances Mary Parmentier, so long as she shall remain single and unmarried, the annuity or annual sum of $2000, during the term of her natural life, or so long as she shall remain single and unmarried. The residue of his estate the testator devises to his executors, in trust "for the maintenance and education of my son Emlen Physick (a child by Frances Mary Parmentier) during his minority (which child I have caused to be legitimatized by an Act of Assembly of the Commonwealth of Pennsylvania)."

The remaining provisions of the will have no particular bearing upon the case in hand.

On the 7th of April 1858, Mr. Physick executed a codicil to his will, in which he says: "there having been, since the making of my last will, born of Frances Mary Parmentier, in said will mentioned, a female child named Ellen Elizabeth, I do hereby declare the said Ellen Elizabeth to be my child, and as such she is to be entitled to the benefit of the fifth provision of my said last will, made and provided with respect to any after-born child of mine by the said Frances Mary Parmentier."

Two children, Emlen and Ellen Physick, and their mother, the said Frances Mary Parmentier, survived the testator, and are still living. The lady who is named in the will as Frances Mary Parmentier, claimed that she was the lawful wife of the testator, and as such filed her refusal to take the legacies and provisions made for her in the will, and elected to take her share as widow under the intestate laws of Pennsylvania.

She also filed a bill to perpetuate testimony in the Supreme Court of Pennsylvania, in which the executors were made defendants.

Before the auditor, the claim of Frances Mary Parmentier, styling herself Mrs. Physick, to one-third of the balance for distribution, as widow of the testator, was formally made by her counsel, and a large amount of testimony taken, establishing among others the following facts:—

Frances M. Parmentier had been married to a Mr. Sawtell, but obtained a divorce in 1851. The costs in this case were paid by Emlen Physick.

About the 1st of January 1852, Mr. Physick rented a house in Juniper street, in which the claimant afterwards resided. The rent of this house was paid by Mr. Physick; he supplied it with the necessaries of life, and passed the greater part of his time there, though his residence was in Spruce street.

On the 5th of November 1852, the claimant bore Mr. Physick a daughter, who was named Susan Emlen Physick.

In April 1853, the house in Juniper street was given up, and the claimant and the child went to reside with Mr. Physick in his house in Spruce street, which was still kept open by him. About 1854, they removed to a house at the corner of Fitzwater and Erie streets, where a son was born to them named Emlen Physick. It does not exactly appear when they left Fitzwater

street, but in 1856 they resided together in a house in South street, between Ninth and Tenth streets, owned by Mr. Physick.

In 1856, probably in November, but the precise date was not shown, a paper was handed by Physick to the claimant, for signature, with the remark, that "it was an application for legitimatizing the child named." She signed the paper, but it was not produced in evidence. The testator then prepared a formal petition to the legislature of this state, which was signed by him alone, and was sworn to by him on the 8th of November 1856. In this document he states, that he "*has never been married,*" has two children—naming them—"both by Frances Mary Parmentier, and both illegitimate," and prays for an act "making them legitimate to the fullest extent, as if born in lawful wedlock."

On the 16th of December 1856, the eldest child, Susan, died suddenly of scarlet fever, and Mr. Physick added a note to the petition stating the death, and confining the application to Emlen, the son.

An Act of Assembly "legitimating Emlen Physick," was passed by the legislature in accordance with the prayer of the petition, and approved on the 7th of January 1857.

About 1854 the testator had spoken to an acquaintance (Cummings) of his "wife and baby," and there is evidence (Trout, Stephens, Ralston, Dr. Doran, Harmer, and Parvin's testimony), that in 1856 and 1857, perhaps in 1854 and 1855, the parties lived and cohabited together as man and wife, and were so reputed.

On the 11th of April 1857, Mr. Physick executed his will, the provisions of which have been already sufficiently recited.

On the 1st of the same month of April, Mr. Physick procured a passport from the State Department at Washington, for "Emlen Physick, accompanied by his wife and son."

This was obtained in contemplation of a voyage to Europe, and on the 13th of April he went to New York, accompanied by the claimant and his son Emlen, and put up at the Astor House in that city. He registered his arrival at the hotel as "Emlen Physick, lady and servant." He embarked for Liverpool on the 14th of April, and during the voyage treated and spoke of the claimant as his wife. In London the parties lived together as man and wife, and the servants addressed the claimant as Mrs. Physick.

On the 6th of August, while still in Europe, a daughter of the parties was born, and named Ellen Elizabeth.

In October they returned to America. During the voyage, Mr. Physick entered his own name on the customary list of passengers, and immediately under it the names of the claimant and of the children, with the mark of ditto under the name of Physick. He introduced the lady to the purser of the steamer as his wife, and spoke of her as such in various ways. On arriving at New York, on the 25th of October 1857, he again went to the Astor House, and entered on the register there, "Mr. and Mrs. Physick, two children, and nurse."

In the same year, after his return, he rented a house in Tenth street. In negotiating for the lease, he spoke of the claimant as his wife, and introduced her as such to the landlady. To another witness, he said that he married a lady in this city, and that he did not marry in Europe; and that the reason why he had not published his marriage was, that his family was opposed to it. He stated that he would bring his wife to see the house, and did bring the claimant.

On the 7th of April 1858, Mr. Physick executed the first codicil to his will, already recited, in which he states that there has been born of Frances Mary Parmentier a female child, named Ellen Elizabeth, whom he declares to be his child, and, as such, entitled to the provision for after-born children, in his will.

In the summer of 1858, Mr. Physick, with the claimant and children, went to Cape May, where he rented a cottage. He introduced the claimant to the proprietor of the cottage as Mrs. Physick; spoke of her as his wife; and they lived together as man and wife, and were reputed there to be such.

After the return of the parties from Europe, several witnesses testify to their living and cohabiting together as man and wife; to Mr. Physick's introducing the claimant as his wife; to her being addressed as Mrs. Physick in his presence; and to their being reputed to be man and wife.

J. T. Thomas, on behalf of the claimant.—Marriage is a civil contract, which requires no proof of ceremony, but may be inferred from the acts of the parties, and such inference must be drawn from the testimony in the present case: *Guard. of Poor* vs. *Nathans*, 5 Penna. L. J. 1; *Forney* vs. *Hallacker*, 8 S. & R. 159; *Chambers* vs. *Dickson*, 2 Id. 475; *Senser* vs. *Bower*, 1 Penna. Rep 450; *In re Taylor*, 9 Paige 611; *Rose* vs. *Clark*, 8 Id. 574; *Fenton* vs. *Reed*, 4 Johns. 53; *Cunningham* vs. *Cunningham*, 2 Dow. 483; *Carr* vs. *King*, 12 Mod. 372; *Longfoot* vs.

Tyler, 1 Salk. 112; *Boulton* vs. *Prentiss*, 2 Id. 1214; *Jackson* vs. *Claw*, 18 Johns. 348; *Newburyport* vs. *Boothby*, 9 Mass. 415; *King* vs. *Twining*, 2 B. & Ald. 385; 1 Bouvier's Law Dic. 274; 3 Stark. Ev. 1248; 2 Phil. Ev. 462–3; 1 Green. Ev. §§ 27, 107, 207; 2 Id. 462; 1 Black. Com. 433; *Tomlinson* vs. *Tomlinson*, MS. C. P. Phila. Co. September 1834, 149.

St. G. T. Campbell, for the executors.—Marriage, though called a civil contract, is much more. With many elements of such a contract, it has many inconsistent with it. Thus, a marriage on Sunday, or by an infant, would be good. Every other contract may be dissolved by act of parties. No other contract can be dissolved by the legislature. It differs from other contracts:—1st. In the way of making it; 2d. In the way of dissolving it; 3d. In the rights and obligations pending it; and 4th. In requiring more solemnity.

Marriage he defined to be a civil status, existing between one man and one woman, legally united for life, for those civil and social purposes which are based upon the distinction of sex.

The authorities, he said, divided themselves into two heads: 1st. Where the question arises between the husband and third parties; and 2d. Between the husband and wife. In the first instance, a man may be responsible to others for the violation of truth, in falsely holding out a person to be his wife, as he may be responsible for falsely declaring himself a partner or possessor of personal property, when not the owner of it. The case of *Savilla Nathans*, 5 Penna. L. J. 1, and others cited by the counsel for the claimant, did not, therefore, apply.

He further argued, that between party and party, proof may be made of the fact of marriage itself, or by a necessary presumption in favor of innocence. In the present case, an irresistible inference was to be drawn from the want of any proof of the fact. If the presumption of innocence be once rebutted, and the original relation between the parties shown to be criminal, proof of the fact of marriage becomes vital, because the case is then shown to be unworthy of the protection of the law, and the indirect proof may be consistent with the want of innocence in the connection.

The Act of Assembly showed that there had been no marriage when it was passed. The evidence was the same after the date of the Act as before it, which showed that the relation had not

been changed. What the auditor believed to be the truth, was the question. The absence of actual proof of marriage, and the direct proof of want of innocence, were conclusive.

The auditor, JOSEPH A. CLAY, Esq. (after stating the facts in detail, which have been condensed above), proceeded to report as follows:—

"In this Commonwealth, marriage in its legal aspect is emphatically a civil contract and nothing more. The precepts of religion and morality may add to its solemnity, but they have nothing to do with its civil obligation. Even the restrictions arising from consanguinity, or from a prior existing engagement of the same nature, or from other incapacities to contract, derive their legal validity from the enactments which follow the dictates of religion, and not from those dictates themselves. The essence of the engagement consists in a consent freely given by parties competent at the time to contract: 2 Kent's Com. 86; *Hantz* vs. *Seely*, 6 Binn. 405, &c.

"However, therefore, marriage may differ in some particulars from other contracts, as in being valid between infants, or when made on Sunday, or in being dissoluble by legislative enactment and not by consent of parties merely, it is still to be proved in civil cases, as all other contracts are, by direct proof of execution, by admission of parties, especially against interest, and by inference from circumstances peculiarly belonging to the conjugal relation; and it may be proved, as other contracts generally cannot be proved, by public reputation.

"It is familiar law, that reputation and cohabitation are sufficient evidence of marriage in Pennsylvania for all civil purposes: *Chambers* vs. *Dickson*, 2 S. & R. 475; *Covert* vs. *Hertzog*, 4 Barr 135; *Thorndell* vs. *Morrison*, 1 Casey 326, &c. The declarations and admissions of the parties are at least of equal force: *Hill* vs. *Hill's Administrators*, 8 Casey 511; *Kenyon* vs. *Ashbridge*, 11 Id. 157; *Guardians of Poor* vs. *Nathans*, 5 Penna. L. J. 1; *Hanna* vs. *Phillips*, 1 Grant 253, &c.; and this is the case even in some actions of a criminal nature: *Forney* vs. *Hallacher*, 8 S. & R. 159.

"The admissions of parties in this instance, as in all others, come within the class of direct proofs. If once established, they are of great weight, especially when made under circumstances which are against the interest, or may be turned to the disadvantage, of the party by whom they are made. Like other direct

proof, they can only be repelled by superior proof of the same nature, amounting to a contradiction.

"The proof from circumstances, such as reputation, conduct, and cohabitation, is presumptive and inferential. As with other presumptions, it may be rebutted by showing inconsistent circumstances, or such as lead to a contrary presumption: 2 Greenl. Ev., § 462, 464; *Covert* vs. *Hertzog*, 4 Barr 135, &c.

"The general and ordinary presumption of the law is in favor of innocence, in questions of marriage, and of legitimacy, where children are concerned. Cohabitation is presumed to be lawful till the contrary appear. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage: 2 Kent 87; *Jackson* vs. *Claw*, 18 Johns. Rep. 346; 2 Greenl. Ev., § 464, &c.; and in Scotland, it seems, it is to be presumed that the guilty connection continued: *Cunningham* vs. *Cunningham*, 2 Dow. 501, 502; Shelford on Marriage 99, and cases cited. In cases, moreover, of *conflicting* presumption on the subject of legitimacy, that in favor of innocence must prevail: *Senser* vs. *Bower*, 1 Penna. Rep. 450.

"Some of the cases on the subject of this class of presumptive evidence are remarkable, and have a direct bearing on the present case.

"In *Fenton* vs. *Reed*, 4 Johns. 51, Elizabeth Guest was the wife of John Guest in 1785. Guest was absent about seven years afterwards, and was reported to be dead. In 1792, Mrs. Guest married Reed, and in the same year Guest returned. He died in 1800. Reed and his wife lived and cohabited together as man and wife until 1806, when Reed also died. After his death, his widow brought suit against a provident society, of which he was a member, and the defence rested on the invalidity of the marriage. There was no direct proof of a marriage after Guest's death, but the court held that, though the original marriage with Reed was void, because the first husband was living, yet the reputation and cohabitation after he died were sufficient to warrant the jury in inferring a subsequent marriage.

"This case is affirmed in *Jackson* vs. *Claw*, 18 Johns. 345.

"*Rose* vs. *Clark*, 8 Paige 474, was a case where Abigail Rose had been married several times. Her first and second husbands deserted her; and the first husband, Frink, survived until after her final marriage with Rose. After the death of Frink there

was no proof of re-marriage, but Rose cohabited with her, and acknowledged her as his wife.

"The court say: 'The only doubt in this case arises from the proof of the fact that the matrimonial cohabitation between these parties commenced previous to the death of the first husband, under a contract of marriage which was absolutely void, although neither of them may have known, at that time, that Frink was still living. It appears, however, from decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation, and general reputation, *even when the parties originally came together under a void contract of marriage.*'

"*Fenton* vs. *Reed* and *Jackson* vs. *Claw* are affirmed, and the court further say, 'the mere fact of a man and woman living together, and carrying on an illicit intercourse, is wholly insufficient to raise a legal presumption of marriage, as it too often happens that such cohabitation takes place when the intercourse between the parties is clearly meretricious. The presumption of marriage only arises from matrimonial cohabitation; where the parties not only live together as husband and wife, but hold themselves out to the world as sustaining that honorable relation to each other.'

"The chancellor also says that he agrees with the opinions in *Cunningham* vs. *Cunningham*, 2 Dow. P. C. 482. 'This was a Scottish case, in which a marriage was attempted to be proved by certificate, by 'habit and repute,' and by declarations of the husband. The alleged wife had died, and the proceedings were instituted by her children, in whose success the father was interested. The original connection was shown to have been grossly immoral; the certificate was impeached for fraud; and the testimony of the witnesses as to reputation was contradictory. The acknowledgments of the husband were open to suspicion, from the circumstances under which they were made, and from his interest.

"The commissioners pronounced in favor of the marriage, and the Court of Sessions affirmed their decision by a bare majority. On appeal to the House of Lords this judgment was reversed. Lord ELDON said (p. 502), that 'the presumption was in favor of the legality of the connection; but where it clearly appeared that it was at first illicit, that the man had expressed doubts whether the child was his own, such a connection was likely to continue illicit.' 'There may be cohabitation between a man and woman

without its being a cohabitation as husband and wife. It was said to have become lawful at some period, none knew when. Afterwards it *became the husband's interest* to set up the marriage. His declarations were, therefore, of no weight.'

"Lord REDESDALE said (p. 514): "The repute of marriage must be general. The conduct of parties must be such as to make almost every one infer that they were married. Here the connection had been long illicit, and it *did not appear when it became lawful.*'

"In *Wilkinson* vs. *Payne*, 4 T. R. 468, an English marriage was illegal, from the infancy of the husband. When he came of age his wife was on her death-bed, and she died *in three weeks afterwards.* On the ground of cohabitation, and treatment as man and wife, the jury presumed a marriage subsequent to the arrival of the husband at full age, and the court sustained the verdict.

"*Senser* vs. *Bower*, 1 Penna. Rep. 432, also requires notice. There was proof, by reputation and cohabitation, of a marriage between Jacob and Catharine Kitelinger. They lived together for years, and had two children, when Kitelinger went to the West, where he remained for seven years, and was reported to have died. There was then similar evidence of marriage between Catharine Kitelinger and Daniel Zinn. About a year after this alleged marriage Kitelinger returned. Catharine left Zinn, and lived with Kitelinger, as his wife, until her death. In an ejectment by a daughter of the marriage with Zinn, GIBSON, C. J., said (p. 402): 'There is said to be the *same evidence* of a precedent marriage of the mother with another man, who was alive at her second marriage, and hence a supposed dilemma; but the *proof being equal*, the presumption is in favor of innocence, and so far is this carried in the case of conflicting presumptions, that the one in favor of innocence must prevail.' Upon this ground, and in consideration of the long separation from the first husband, the judgment in favor of the plaintiff was affirmed.

"In a very recent English case, *Goodman* vs. *Goodman*, 28 Law J. Rep. 745, there was proof of a marriage by reputation and cohabitation, by the admission of the husband under oath, and by the baptism of children. This was sought to be rebutted by proof of declaration by the husband, that he had not been married; by the refusal of his family to recognise his marriage, and by the *terms of his will*, where the children were not acknowledged to be legitimate, but so named as to lead to a contrary

inference. There was also some proof of an original illicit intercourse. The Vice-Chancellor STUART decided, that there was not sufficient evidence to counteract the presumption of marriage arising from the proof in support of it, and he cited *Doe* vs. *Fleming*, 4 Bing. 266, to show that 'the burthen of proof to rebut such a presumption rested entirely on those parties who disputed the marriage.' This decision was affirmed by the Lords Justices, KNIGHT BRUCE and TURNER, on appeal.

"The last decision to which the auditor will refer, is that *In re Taylor*, 9 Paige 611, a case which bears great analogy to that under consideration.

"There was strong proof of marriage between Taylor and his wife, by cohabitation, public recognition by himself and the children of a former marriage, and by entry of the births of the children of the second marriage, by Taylor, in a family register. Afterwards he left his wife for a long period, and finally became insane. Some of the children by the first wife alleged that the second connection was illicit. They produced a letter of Mrs. Taylor, which was said to admit that she had never been married; and they also produced a mutilated declaration of their father, after the separation, to the same effect.

"The court held, that the facts were sufficient to authorize any court or jury to presume a marriage between the parties, 'even if there was reason to believe that an illicit connection had before existed between them.' The declarations made after the cohabitation had terminated, were rejected as not contemporaneous.

"Other cases might be cited, but these are sufficient to establish the principles of law which govern the case. It remains to apply these principles to the testimony.

"The divorce from Sawtell was obtained in October 1851. The proof that Mr. Physick advanced the costs of the proceeding is, of itself, quite as consistent with a design of marriage as with an illicit intention; but, taken in connection with the subsequent circumstances, it undoubtedly favors the latter conclusion.

"The conclusive proof of this, however, is to be found in the act of legitimation of Emlen Physick. This child was born on the 25th of June 1855, and the act was passed on the 7th of January 1857. It proves absolutely the view of the connection that Physick held, or which he wished to be held, at the time. As to the claimant, nevertheless, its chief force depends upon the application for the act, which she admits that she signed, but

which has not been produced. Without this admission, her acquiescence in the enactment of the law, and her subsequent cohabitation with Physick, without protest, would be strong circumstances against her, but they could not have the weight of a direct consent to the proceeding. This consent, however, cannot be pressed too far. The petition of Mr. Physick alone, which seems to have been substituted for the joint one, not only states that the birth of the child was illegitimate, but that he himself had *never been married.* This allegation is important, for, if true, it shows that there had been no marriage down to the *date of the petition* itself; while the mere declaration that the child was base-born, only shows that there had been no marriage at the date of the *birth.* The weight of the intermediate testimony, as to admissions and reputation, depends upon which of the two dates is assumed as the period to which this decisive proof of absence of marriage refers. Now, while the acquiescence of the lady is conclusive on this point, at the first date, it requires, to make it conclusive as to the second date, that it should be shown that the allegation of no marriage, up to that time, was contained in the petition which she signed, but which is said to have been lost. Without this proof, the intermediate testimony must be allowed some weight, and cannot be wholly disregarded, as referring to a date certainly prior to the marriage.

"The first testimony in point of time is that of Dr. Doran. He visited the parties when they lived in Spruce street in 1853, and in Fitzwater street (where the child was born), and he visited for a week at their house in South street, with his wife and family, before the voyage to Europe. He says that 'they were reputed as living together as man and wife.' Part of this evidence relates to a time prior to the birth of the child, and part to a time between the birth and legitimation.

"The testimony of Stephens, Ralston, Cummings, and Harmer is in the same category. In 1854, Physick spoke to Cummings of his 'wife and crying baby.' In 1856 or 1857 the witness was introduced to the claimant as Mrs. Physick; visited the house, and addressed her, and heard others address her, by that name.

"Ralston speaks of their residing together as man and wife, from 1855 downwards. He never knew what position they stood in, until after Mr. Physick's death, but supposed they were married when they came back from Europe.

"Stephens lived with the parties, as coachman, from March 13th 1854, until Mr. Physick's death. He heard the claimant addressed as Mrs. Physick, in Mr. Physick's presence; heard him speak of her as Mrs. Physick, to himself, his fellow-servants, and twice to strangers; and he says they were generally reputed as man and wife. Harmer's testimony, to the same general effect, begins about 1856. He was introduced by the testator to the lady as Mrs. Physick, and he frequently spoke of her as his wife.

"Some reference must also be made to the testimony of Mrs. Bouvier and Dr. Ritchie, which falls in whole or in part within this time. Mrs. Bouvier thought they were man and wife, and she was always addressed as Mrs. Physick. Dr. Ritchie says, that so far as his understanding was, he believed them to be man and wife, and knew nothing to the contrary. This testimony is weakened somewhat by the fact that he always addressed her by her Christian name of Fanny.

"There is great similarity in the facts stated by the witnesses prior to the act and since its passage. If the assent of the claimant to the proceeding related only to the birth of the child, the preponderance of the evidence would be decidedly in her favor. If it admitted no marriage until the act was passed, the weight would be nearly equal. By itself, therefore, a marriage cannot fairly be inferred from the testimony of these witnesses. If inferred at all, it must be presumed to have taken place at a later date, and be established by other circumstances and witnesses in connection with the subsequent evidence of those already mentioned.

"About three months after the act had been passed, Mr. Physick, as already stated, procured his passport and sailed for Europe with the claimant; returned in the fall of 1857, and rented the house in Tenth street. The next summer he rented the cottage at Cape May, and ended by residing in South street up to the time of his death. During all this time his acts of recognition were unequivocal.

"It must be admitted that the testimony, considered by itself, would be sufficient to prove a marriage by reputation and admission. The countervailing circumstances are the declarations of the testator, in his will, and the original illicit nature of the connection.

"To estimate properly the weight to be given to the testa-

mentary statements, the position of the parties must be considered. The claimant has renounced the provisions in her favor in the will, and claims in opposition to that instrument. She stands in an adverse attitude to the executors who represent the testator, and thus in an adverse position to the testator himself. On the supposition of an actual marriage, which he was obliged, as he said to Miss Kelly, to conceal, he must be supposed to have contemplated the possibility of his wife claiming paramount to his will. Statements, therefore, in that instrument may have been made with this view, and at any rate they are in accordance with his wishes and in his own favor. If admissible at all, in a contest like the present, they can be allowed but little weight in opposition to admissions against his own interest.

"The presumption that, as the intercourse was illicit originally, it continued to be illicit, is met by the counter-presumption arising from the testimony, since the act of legitimation. According to *Senser* vs. *Bower*, in the event of such countervailing presumptions, that in favor of innocence must prevail; and the cases of *Rose* vs. *Clark* and *Fenton* vs. *Reed* show that presumptive proof of marriage may be made, even where the connection began illegally, and continued for a long time to be immoral. In the last instance, as soon as the parties became aware that the prior husband was in life, their connection was not only illicit, as in the case in hand, but *adulterous*, and therefore of a deeper dye. In law and in morals, adultery is a higher crime, and visited with more severe penalty, than mere meretricious intercourse. This fact must not be overlooked, for it forms the true criterion for the application of many of the cases cited. If marriage from subsequent cohabitation, repute, and admissions, may be presumed where the parties originally lived in adultery, surely it may be presumed where they lived originally in concubinage.

"There remain the distinct and direct admissions of Mr. Physick, made since January 1857. At every step in the subsequent testimony, we find some open avowal. In his passport, at the hotel, on his voyages, in his own house, and at Cape May, he holds out the lady as his wife. The most decisive testimony, and that on which the whole case might almost be rested, is that of Miss Kelly. He had married a lady, he said, in this city, and had kept his marriage secret on account of his family. This lady was the claimant, whom he afterwards brought to the house

as his wife. Here was not only a formal and distinct admission, but a plausible reason alleged for concealment. The argument against this is, that he wished to enjoy her society, and could not do so without passing her off to the world as his wife; but, if he chose to use this deceit, he must abide the consequences.

"Undoubtedly, as was ably argued by the counsel for the executors, there is a difference, where the question of marriage or no marriage arises between the husband and third persons, and where it arises between the husband and wife themselves. Much slighter proof will render the husband responsible in the one case than in the other. Upon grounds of public policy, a man shall not hold himself out to be that which he is not, without incurring all the responsibilities of his falsehood. A single admission of partnership or marriage may establish a liability where an innocent third person is concerned. Still, where the marriage is alleged by the wife, the difference is not in principle, but in *degree of proof*. Certainly the admissions of Mr. Physick would have rendered him liable to Trout for provisions, and to Parvin for groceries, but they are equally evidence for the claimant. In the one instance they are conclusive; in the other they may be rebutted by circumstances or other countervailing proof. As admissions, they are as much against interest in the one case as in the other.

"The award of the auditor upon the facts is equivalent, it is said, to the finding of a jury in a trial at law. A jury is sworn to render a true verdict according to the evidence, and can regard nothing else. Acting upon this principle strictly, the auditor has confined himself to the evidence before him, and reports that the testimony is sufficient to establish a marriage between Emlen Physick and Frances Mary Parmentier, subsequent to the birth of Emlen Physick, their son, by reputation, by cohabitation as man and wife, and by admissions of the testator; and that these presumptions are not rebutted by the irregularity of the original intercourse, by the act of legitimation, or by the declarations in the will.

"The exact date of a marriage proved by testimony of this nature cannot be accurately decided. It is necessary, however, that some approximation to a date should be assumed, as upon this will depend the further question, whether the daughter, Ellen Elizabeth Physick, is legitimate or illegitimate, and, con-

sequently, whether her legacy of $30,000 is subject or not to be taxed as a collateral inheritance. She was born while her parents were in London. Mr. Physick, in the conversation with Miss Kelly, in which he so distinctly admitted his marriage, said that he had not married in Europe; he had married a lady in this city. He had been, he said, in Europe, but did not like it. These declarations were made shortly after his return, and of themselves would lead to the inference that he had married before he went abroad. The admissions prior to his voyage, though not altogether so weighty as those made afterwards, are quite sufficient to corroborate this inference, and to warrant the auditor in assuming that the marriage must have taken place before the voyage, that the child is consequently to be taken as the legitimate offspring of the testator, and that the legacy is not subject to the collateral tax."

Exceptions to this report were filed, and on the appeal the case was argued by

James F. Johnson, for appellants.

J. T. Thomas and *J. K. Findlay*, for appellee.

The opinion of the court was delivered by

STRONG, J.—The report of the auditor so fully and accurately expresses our views of the questions raised, that no possible good could result from a new discussion of them. We cannot doubt that the conclusions reached by him are sustained by the evidence. At least the preponderance of the evidence is on the side of the appellees. We therefore overrule the exceptions taken to the decree of the Orphans' Court, and dismiss the appeal, referring to the report of the auditor.

Appeal dismissed at the costs of the appellant.